IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

NO. 76-6513

WILLIE LEE BELL,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SIMON L. LEIS, JR.
Prosecuting Attorney

LEONARD KIRSCHNER
Assistant Prosecuting Attorney

ROBERT R. HASTINGS, JR.
Assistant Prosecuting Attorney

WILLIAM P. WHALEN, JR.
Assistant Prosecuting Attorney

CLAUDE N. CROWE
Assistant Prosecuting Attorney

420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202

Attorneys for Respondent

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases cited: page

Statutes cited: page

Rules cited:

Constitutional provisions cited:

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REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully submits that it is opposed to the issuance of a writ of certiorari in the within cause for the reason that the Ohio Supreme Court has decided the federal questions at issue in accord with the applicable decisions of this court.

OPINIONS BELOW

The Petition of the petitioners correctly cites the opinions below. (Appendix C)

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I. Whether Sections 2929.03 and 2929.04 of the Ohio Revised Code, which provide for the imposition of the death penalty under certain circumstances, are violative of the Eighth Amendment of the United States Constitution.

II. Whether the voluntary waiver of trial by jury and request to be tried by a three-judge panel in a capital case by a defendant violates the right to jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

III. Whether a juvenile defendant's statement to the police shall be suppressed from evidence where the totality of circumstances demonstrate that the accused was advised numerous times of his constitutional rights, that he stated that he fully understood those rights, and that he did not wish his parent to be present during the giving of his statement.

IV. Whether the police are required to inform a juvenile and his parents of all the possibilities that could occur to him with regard to possible disposition of the case during the initial interrogation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Sections 2903.01, 2929.02, 2929.03, and 2929.04 of the Ohio Revised Code, are set forth in Appendix A herein.

STATEMENT OF THE CASE

Petitioner Bell and one Samuel Hall were jointly indicted by the Grand Jury of Hamilton County, Ohio, on November 22, 1974, for two counts of aggravated murder with specifications, one count of kidnapping and one count of aggravated robbery. Petitioner Bell and Samuel Hall were tried separately, each to a three-judge panel from the Court of Common Pleas for Hamilton County, Ohio.

On January 10, 1975, Petitioner's motion to determine his ability to stand trial was heard by a single trial judge. After hearing the evidence the court found the Petitioner to be competent to stand trial. After that determination had been made the Petitioner voluntarily waived a trial by jury and requested a three-judge panel to hear the case (R 53-58) *.

Four days later on January 14, 1975, Petitioner's motion to suppress the statement Petitioner had given to the police was overruled. That same day the trial on the merits commenced before the three-judge panel.

The evidence revealed that the Petitioner and Samuel Hall kidnapped Julius Graber at gunpoint from the parking garage of his apartment building. Mr. Graber was forced to lie in the trunk of his own vehicle while he was driven first by Samuel Hall and then the Petitioner to an isolated lane which went into Spring Grove Cemetery.

Petitioner backed Graber's car down the lane with the headlights turned off. Once they exited from the car Petitioner asked Samuel Hall, "What are *we* going to do now." They removed Mr. Graber from the trunk and led him into the woods.

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* "R" is a reference to the Transcript of Proceedings in the case of *State of Ohio* v. *Willie Lee Bell*.

Robert Pierce, who lived in an adjacent apartment building, heard Mr. Graber plead, "Don't shoot me. Don't shoot me." Then he heard a shot, a short interval of time passed, and then he heard a second shotgun blast. Mr. Pierce continued to watch the cemetery as Samuel Hall entered the automobile from the passenger's side and moved over to the driver's seat. The car then approached the roadway without any headlights on and turned onto the highway and into the night.

The police were notified immediately. They responded to the scene of the shooting within minutes. Mr. Graber had sustained a shotgun blast to the rear of his head but the officers detected some life signs so the emergency squad was summoned. By the time the emergency squad transported Mr. Graber to Cincinnati General Hospital he had expired.

Later at the morgue the officers discovered that Mr. Graber had attempted to secret valuables such as his ring, money and keys in his pockets and shoes. In the opinion of the coroner the fatal shot to the rear of Mr. Graber's head was fired at contact range with Mr. Graber's hands being clasped behind his head at the time of the shooting.

After the shooting the Petitioner and Samuel Hall drove to Dayton, Ohio, in their victim's automobile. The next morning they commandeered Kenneth Hardin, a gasoline station attendant, into the trunk of his automobile at gunpoint. Fortunately, a state highway parolman stopped Samuel Hall who was driving Hardin's car, for a faulty muffler. The Petitioner was following in the Graber automobile until he saw the patrolman stop his companion. He then returned to Cincinnati where he abandoned the Graber automobile in a vacant garage a short distance from his residence.

One week after the homicide the police went to the Petitioner's residence to ask him to come with them to the police station to answer some questions concerning Samuel Hall. Once it became apparent that the Petitioner was also involved in the homicide of Julius Graber, the police advised him of his constitutional rights.

The officers told the Petitioner they would like him to make a tape recorded statement and that he had a right to have his mother present with him when he gave the statement if he so desired. The Petitioner stated he did not want his mother to be present. The police then called Petitioner's mother, advised her that her son was involved in a homicide and kidnapping and that he had admitted his involvement. Petitioner's mother informed the police she did not want to come down to the police station and that her son could give the statement.

Prior to giving the recorded statement the Petitioner was given a form to read which contained his constitutional rights. A police officer read the form to the Petitioner and asked if he understood his rights. The Petitioner stated he understood his rights and then he signed the form. At the outset of the tape recording the Petitioner indicated that he had been fully advised of his constitutional rights. A tape recorded statement detailing the Petitioner's involvement was then given.

Expert testimony revealed that the fatal shot was fired from the same shotgun that was recovered from the Hardin vehicle that Samuel Hall was driving at the time of his arrest. Further expert testimony demonstrated that Petitioner's fingerprint was located on the outside window on the driver's side of the Graber vehicle.

Based on the evidence adduced at trial the three-judge panel found the Petitioner guilty of aggravated murder

while committing kidnapping as well as finding him guilty of aggravated robbery and kidnapping.

Pre-sentence and psychiatric examinations were ordered pursuant to the Ohio statutes prior to the imposition of sentence. On February 3, 1975, a mitigation hearing was held before the three-judge panel. After hearing all the evidence the court unanimously found no mitigating circumstances to be present. Accordingly, the Petitioner was sentenced to death.

The conviction and sentence were affirmed by the Court of Appeals for the First Appellate District of Ohio, Hamilton County, on April 12, 1976. The Supreme Court of Ohio affirmed the conviction and sentence on December 22, 1976. Petitioner's motion for rehearing was denied by the Supreme Court of Ohio on January 14, 1977.

ARGUMENT

I.

Whether Sections 2929.03 and 2929.04 of the Ohio Revised Code, which provide for the imposition of the death penalty under certain circumstances, are violative of the Eighth Amendment of the United States Constitution.

The primary issue presented by Petitioner is whether Ohio's statutory scheme, which imposes the death penalty, passes constitutional muster in light of this Court's most recent pronouncements on capital punishment as they relate to the Eighth Amendment. Respondent submits that the Ohio laws conform with constitutional standards as defined by this court and as applied by the Supreme Court of Ohio.

Following the decision in *Furman* v. *Georgia,* 408 U.S. 238 (1972), the Ohio legislature enacted Section 2929.02, Ohio Revised Code (Appendix A), which prescribes the death penalty or life imprisonment for the crime of aggravated murder. Sections 2929.03 and 2929.04, Ohio Revised Code, (Appendix A) set forth the procedure for determining whether the death sentence is to be imposed. Aggravated murder is limited to purposeful killing as defined by Section 2903.01, Ohio Revised Code (Appendix A).

Those statutes permit the death penalty only where one or more aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt. The aggravating factors include: assassination of the President, Vice-President, Governor, Lieutenant Governor, or a per-

son who has been elected to or is a candidate for any such office; murder for hire; murder to escape accountability for another crime; murder by a prisoner; repeat murder or mass murder; killing a law enforcement officer; and murder in the course of certain felonies.

Under the Ohio statutory scheme the trier of fact may be either a jury or, if waived, a three-judge panel. First the trier of fact is to consider whether the defendant is guilty of the charge, and if found guilty, whether he is also guilty of one or more of the specifications in the indictment.

If the defendant is found guilty of the charge and innocent of the specification, a sentence of life imprisonment is imposed. If the defendant is found guilty of the charge and guilty of one or more of the specifications, a separate hearing is held before the trial judge or three-judge panel to determine whether mitigating circumstances exist which preclude imposition of the death penalty.

A pre-sentence investigation and a psychiatric examination of the defendant are required to be made before the hearing. Copies of these reports are furnished to the prosecutor and to the defendant or his counsel. Other evidence and testimony may be submitted at the mitigation hearing, including any statement, sworn or unsworn by the defendant. The death penalty is to be imposed if the trial judge or the three-judge panel unanimously finds that none of the three mitigating factors have been established to exist by a preponderance of the evidence.

In considering whether one of the mitigating circumstances has been established by a preponderance of the evidence the sentencing authority is to consider the nature and circumstances of the offense and the history, character, and condition of the defendant.

Thus, Ohio's statutes provide for a bifurcated trial, in which the issues of guilt, as to the charge and of certain statutorily defined aggravating circumstances, are determined by the jury or, if waived, by a three-judge panel, and the issues of mitigation and sentence are determined by the trial judge or by the three-judge panel.

The defendant has a direct right of appeal of his conviction and sentence pursuant to Rule 4 (B), Ohio Rules of Appellate Procedure (Appendix B). Appeals by leave are governed by Rule 5, Ohio Rules of Appellate Procedure (Appendix B). In accordance with Rule 12 (A), Ohio Rules of Appellate Procedure (Appendix B), the Court of Appeals shall rule on all assignments of error briefed by the Appellant. If the sentence of death is affirmed by a Court of Appeals, a further appeal as a matter of right may be taken to the Supreme Court of Ohio, as provided by Section 2 (B) (2) (a) (ii), Article IV of the Ohio Constitution (Appendix B).

Ohio's statutory scheme differs somewhat from any of these considered by this Court in its July 2, 1976, decisions, but it is basically similar to the Georgia, Florida, and Texas statutes which this Court found to be constitutional. The Ohio statutory scheme insures that the sentencing authority is apprised of information relevant to the imposition of the death sentence and provided with standards to guide its use of the information. Guided by this information and applicable standards the sentencing authority is directed to give attention to the nature or circumstances of the crime committed and to the character of record of the defendant. Thus, Ohio's statutory scheme provides a framework in which the sentencing authority cannot wantonly or freakishly impose the death sentence.

A.

It is submitted that the mitigating circumstances enumerated in Section 2929.04 (B), Ohio Revised Code pass constitutional muster. These standards, although limited to three, echo the language found in the Model Penal Code, (Section 210.6 (4) (C) (f) (g), and Florida Statutes (Section 921.141 (6) (b) (c) (e) (f). "While these questions and decisions may be hard, they require no more line-drawing than is commonly required of a fact finder in a lawsuit," *Proffitt* v. *Florida,* —— U.S. ——, 96 S. Ct. 2960, 2969 (1976). As the Court pointed out, the requirements of *Furman* are satisfied, "when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty", —— U.S. ——, 96 S. Ct. at 2969. Clearly, Ohio's statutory scheme satisfies this requirement.

The mitigating circumstances must also be considered as they have been construed by the Supreme Court of Ohio. The Supreme Court of Ohio has repeatedly held that the mitigating circumstances are not to be construed narrowly and that relevant factors, such as prior criminal record and the age of the defendant, are to be considered by the sentencing authority, *State* v. *Bell,* 48 Ohio St. 2d 270, 280-283 (1976); *State* v. *Black,* 48 Ohio St. 2d 262, 267-268 (1976); *State* v. *Woods,* 48 Ohio St. 2d 127, 133-138 (1976); and *State* v. *Osborne,* 49 Ohio St. 2d 135, 145-147 (1976). Through the state appellate procedure each of the mitigating circumstances in Section 2929.04 (B) has undergone close judicial scrutiny.

The mitigating circumstances in Section 2929.04 (B) channel and guide the discretion of the sentencing authority so as to avoid the arbitrary and capricious imposition of the death penalty.

B.

Petitioners have raised the issue of inadequacy of appellate review for the first time in their writ. It was neither argued nor briefed in the Court of Appeals or the Supreme Court of Ohio. Neither of those courts nor the trial court had an opportunity to rule upon the merits of the issue. Respondent prays that this Court not be the one to first issue an opinion on this question that was not raised by the Petitioner in the State courts, *Cardinale* v. *Louisiana,* 394 U.S. 437, 438 (1969).

It is submitted that defendants facing the death penalty in Ohio have adequate appellate review so as to insure that the penalty is not arbitrarily or capriciously imposed. Defendants have a direct right of appeal to the Court of Appeals and a direct right of appeal to the Supreme Court of Ohio where the lower court of review affirms their death sentence, Rule 4 (B), Ohio Rules of Appellate Procedure and Section 2 (B) (2) (a) (ii), Article IV of the Ohio Constitution. Thus, the Supreme Court of Ohio, a court with statewide jurisdiction, affords a defendant sentenced to death a full judicial review so as to promote the evenhanded, rational and consistent imposition of the death sentences under law. *Jurek* v. *Texas,* —— U.S. ——, 96 S. Ct. 2950, 2958 (1976); *State* v. *Miller,* 49 Ohio St. 2d 198, 204 (1977).

This Court has never mandated a particular form of appellate review in death penalty cases. In *State* v. *Bayless,* 48 Ohio St. 2d 73, 86 (1976), the Supreme Court of Ohio stated that in all capital cases the aggravating and mitigating circumstances would be independently reviewed in each case to insure that capital sentences are fairly imposed by Ohio's trial judges. As the Supreme Court of Ohio observed in *State* v. *Osborne,* 49 Ohio St. 2d 135,

146 (1976), "The Ohio statutes require the death sentence to be imposed upon all defendants convicted of aggravated murder coupled with at least one of seven aggravating circumstances, provided that none of the three mitigating factors exists." Accordingly, all similarly situated defendants are sentenced alike and have their sentences reviewed by a court of statewide jurisdiction.

Contrary to Petitioner's assertion, the Supreme Court of Ohio is not precluded from inquiring into whether findings of fact are correct. In *State* v. *Edwards,* 49 Ohio St. 2d 31, 47 (1976), the Supreme Court of Ohio stated that a determination of whether there is substantial evidence to support the verdict rendered whether it be the verdict on the criminal charge, aggravating circumstance, or mitigating circumstance, would be made in each capital case. This scope of review is consistent with both the review afforded by the courts in Georgia and Florida which this Court has determined to pass constitutional standards.

The fact that the Supreme Court of Ohio has affirmed all but one capital sentence it has reviewed only indicates that the Ohio statutory scheme has narrowed the scope of the statutes which provide for the death penalty, with further provisions to focus on the individual nature of the crime and characteristics of the defendant, so that all those upon whom the death penalty is imposed are truly similarly situated.

Prior to the decison in *Furman* v. *Georgia,* supra, the Ohio statutory scheme permitted the jury to extend mercy in a capital case. That standardless procedure of Ohio's was upheld by this Court in the case of *McGautha* v. *California,* 402 U.S. 183 (1971). In an order to comply with the dictates of *Furman* v. *Georgia,* supra, the present Ohio scheme, which provides standards to channel discretion, was enacted. Yet Petitioner now claims Ohio affords

no discretion now, whereas before the problem was too much discretion. It is submitted Ohio's present statutory scheme does provide the sentencing authority with sufficient standards to channel their discretion so as to avoid arbitrary and capricious imposition of the death penalty.

C.

The record reflects that the trial court painstakingly examined both the Petitioner and his counsel to ascertain whether his waiver of a jury trial was totally voluntary. Petitioner voluntarily, intelligently and knowingly waived a trial by jury and elected to be tried by a three-judge panel. At no time did Petitioner or his counsel assert that his Sixth Amendment right to trial by jury was being "chilled" by Ohio's statutory scheme which provides that a three-judge panel must unanimously find an absence of mitigating circumstances.

Unlike the statute in *United States* v. *Jackson,* 390 U.S. 570 (1968), the death penalty is possible under the Ohio statute whether the defendant is tried before a jury or a three-judge panel, and it may be avoided under both alternatives.

Petitioner attempts to rest his argument of coercion on a "numbers" game. That is, it is easier to convince one of the three-judge panel a mitigating circumstance has been proven than it is to convince only one judge. Obviously, this approach overlooks the possibility that the one judge the Petitioner may have to convice is the same judge who would have heard the case with a jury. For the sake of argument, it is submitted that it may be even easier for the Petitioner to convince one of the twelve jurors that he was not guilty or that he was not guilty

of an aggravating circumstance. Without unanimity by the jury the result is either a hung jury or a life sentence.

As in any waiver of a constitutional right there are certain considerations which incline toward exercising the right and other considerations which incline toward waiving the right. The balance struck by these competing considerations is for the judgment of the defendant and competent trial counsel. That is what occurred in this case. Petitioner has detailed these considerations, which include the fact that there was no defense of alibi or self-defense, there was a confession which was not suppressed, and there were indications from pre-trial psychiatric reports that an insanity defense would not prevail. It is submitted it was these considerations that were the basis for the jury waiver.

Mr. Justice Harlan observed in *McGautha* v. *California,* supra, that, "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. . . . Although a defendant may have a right even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose", 402 U.S. at 213. The fact that the Petitioner was faced with a difficult judgment as to which course to follow does not make Ohio's statutory scheme unconstitutional.

Furthermore, actual experience in Hamilton County, Ohio, demonstrates that the Ohio statutory scheme does not coerce a defendant into waiving his constitutional rights. Of the fifteen capital cases tried in Hamilton County, Ohio, at the time the Supreme Court of Ohio reviewed Petitioner's appeal ten were tried to juries, four were heard by three-judge panels, and one was disposed of by way of appeal. These figures, which have never been

disputed by Petitioner, suggest the total absence of any substantial coercion or statutory tilt toward inducing jury waivers. To the contrary, the figures suggest that the balance is on the side of twelve jurors determining the issue of guilt.

D.

There is ample evidence in the record that Petitioner affirmatively assisted and acted to complete the shotgun slaying of Julius Graber. Pursuant to Section 2923.03 (A) (2) and (F) of the Ohio Revised Code (Appendix A), one who aids and abets another in committing an offense is guilty of the crime of complicity, and may be prosecuted and punished as if he were the principal offender.

The courts of review in Ohio have consistently found, upon a review of the record, that sufficient evidence was adduced to convict the Petitioner for the crime of aggravated murder with specifications. Petitioner's assertion that the Respondent failed to prove purpose is quixotic at best. The evidence demonstrated that the victim died as a result of a shotgun blast, fired at contact range, to the rear of his head while his hands were clasped behind his head.

Imposition of the death penalty in this case is not disproportionate nor does it offend any known contemporary standard of decency.

E.

Like the issue raised in subsection B above, this issue was never assigned as error before the Ohio courts of review. Where federal questions are raised before this Court for the first time on review of state decisions, it is submitted that this Court should not decide those issues.

At the time the mitigation hearing is conducted a defendant stands convicted of aggravated murder and at least one of the aggravating circumstances which was specified in the indictment. The introduction of mitigating circumstances has traditionally been a defense function. The mitigating circumstances listed in Section 2929.04 (B) are far broader than affirmative defenses which the defense must bear the burden of going forward with evidence in order to excuse or otherwise justify the commission of an offense.

Once the defendant stands convicted of the charge and specification, it should rightfully be his burden to present evidence as to why the punishment should be lessened. To require the defendant to do so does not infringe upon any due process rights., *State* v *Lockett*, 49 Ohio St. 2d 48, 65-66 (1976).

Placing the burden of proof on the defendant at mitigation is clearly distinguishable from placing a burden of proof on the defendant to prove his innocence. For that reason it is submitted that the Ohio statutory procedure does not run afoul of the Due Process Clause as this Court has interpreted that clause in the cases of *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), and *In re Winship*, 397 U.S. 358 (1970). In both those cases the Court stated it was the government's burden to prove guilt beyond a reasonable doubt. Ohio's statutory scheme does not deviate from that command and is consistent with the Court's ruling in *Leland* v. *Oregon*, 343 U.S. 790 (1952).

F.

Like the issues raised in subsections B and E above, this issue has never been assigned as error before the Ohio courts of review. Where federal questions are raised before this Court for the first time on review of state

decisions it is submitted that this Court should not decide those issues.

Although this Court has pointed out that the jury sentencing in a capital case can perform an important societal function, *Witherspoon* v. *Illinois*, 351 U.S. 510, 519 n. 15 (1968), it has never suggested that jury sentencing is constitutionally required, *Proffitt* v. *Florida*, — U.S. —, 96 S. Ct. 2960, 2966 (1976).

Pursuant to the Ohio statutory scheme the trial judge or three-judge panel is the sentencing authority depending on whether or not the defendant waives a trial by jury. It is submitted that this system of judicial sentencing enhances the constitutionality of the Ohio statutory scheme in so far as it should lead to even greater consistency in the imposition of capital punishment due to the experience a trial judge has in sentencing procedures.

Prior to *Furman* v. *Georgia*, supra, the Supreme Court of Ohio held that there was no constitutional provision prohibiting a three-judge court from determining the degree of guilt and sentence without the intervention of a jury, where a jury trial had been voluntarily waived, *State* v. *Ferguson*, 175 Ohio St. 390, 396 (1964), *State* v. *Frohner*, 150 Ohio St. 53 (1948). As was mentioned earlier this Court held that Ohio's pre-*Furman* statutory scheme was constitutional in *McGautha* v. *California*, supra. It is submitted that the imposition of sentence by a three-judge panel or trial Court under the present statutory scheme is no different constitutionally than allowing a three-judge panel to impose sentence without the intervention of a jury under the previous statutory scheme.

II.

Whether the voluntary waiver of trial by jury and request to be tried by a three-judge panel in a capital case by a defendant violates the right to jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

Respondent's argument with respect to this question is set forth above in subsection C of the first question, ante pp. 13-15.

It is to be noted that no motion for severance of the counts in the indictment was ever made by Petitioner at trial. As pointed out earlier, there were several considerations which would explain why Petitioner chose to follow the course he did. There is nothing to suggest that the Ohio statutory scheme forced him to waive a jury.

III.

Whether a juvenile defendant's statement to the police shall be suppressed from evidence where the totality of circumstances demonstrate that the accused was advised numerous times of his constitutional rights, that he stated that he fully understood those rights, and that he did not wish his parent to be present during the giving of his statement.

IV.

Whether the police are required to inform a juvenile and his parents of all the possibilities that could occur to him with regard to possible disposition of the case during the initial interrogation.

For the purposes of argument the presentation of respondent's response will be consolidated since the two questions present interrelated issues.

This Court held in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), that the prosecution could not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

When the police asked Petitioner, a juvenile with prior contact with law enforcement, to come to the police station to answer some questions his mother was notified where he was being taken and the purpose for which he was being taken to the police station.

Once the Petitioner arrived at the police station he was asked questions concerning Samuel Hall. Based on other information received by the interrogating officer, concerning Petitioner's involvement in the homicide of Julius Graber, the Petitioner was advised of his *Miranda* rights. Petitioner stated he understood what his rights were.

Before any tape recorded statement was taken the Petitioner was again fully advised of his constitutional rights. A notification of rights form was read to Petitioner. Petitioner was also given the form to read. After reading the form and stating he understood his rights the Petitioner signed the form.

The police also informed the Petitioner that he had the right to have his mother present when he gave the recorded statement if he so desired. The Petitioner stated he did not wish to have his mother present. Nevertheless, Petitioner's mother was notified that her son was involved in a homicide and that he had admitted his involvement. The police asked Petitioner's mother if she would like to be present when her son gave a recorded statement. Her response was to let Petitioner make the statement by himself. The police again asked the Petitioner if he wanted his mother present and he again said he did not.

The question of whether a juvenile intelligently and voluntarily waives his rights cannot always be decided by the same criteria applied to mature adults, see, *Haley* v. *Ohio,* 332 U.S. 596 (1948); *In re Gault,* 387 U.S. 1 (1967). The Supreme Court of Ohio has held that the test to be applied in determining the voluntariness, and, thus the admissibility of a juvenile's statement is the "totality of circumstances" test, *State* v. *Stewart,* 176 Ohio St. 156 (1964); *State* v. *Carder,* 9 Ohio St. 2d 1 (1966). It is submitted that Ohio is in accord with the majority of other states and federal courts that have addressed the issue of statements taken from juveniles, see, *Theriault* v. *State,* 223 N.W. 2d 850, 854 (Wis. Sup. Ct. 1974).

The Respondent met its burden in proving that the inculpatory statement made by the minor Petitioner was made pursuant to an intelligent and voluntary waiver of his constitutional rights of which he was fully advised.

There is no requirement in *Miranda* that the parents of a juvenile shall be read his constitutional rights along with their child, and that, by extension, both parent and child are required to intelligently waive those rights before the juvenile makes a statement. The right against self-incrimination is a personal right. It can only be invoked

by an individual. Constitutional rights are not to be invoked or waived by committee. They are individual rights.

The fact the State of Indiana has chosen to require the police to inform a juvenile's parents or guardian of his rights to an attorney, and to remain silent is not controlling here. The question here is whether the procedural safeguards in Ohio conform with the demands of the Fifth Amendment and the Court's decision in *Miranda* v. *Arizona,* supra. Had Petitioner perpetrated this heinous crime in the State of Michigan he would not be facing the death penalty at all.

The police did advise Petitioner's mother that her son was involved in a homicide, kidnapping and aggravated robbery. Her response was to decline the police's offer to transport her to the police station so she could be present when the Petitioner gave a recorded statement. To require the police to further advise the parent that her son *may* suffer the death penalty with the use by the prosecution of the statement and that he *may* lose the protection of juvenile court is a proposition that is unsupported by any authority from any jurisdiction.

The officer related to Petitioner's mother all of his knowledge at that point. Any further advice by the officer concerning the death penalty or Juvenile Court would have been pure, and improper, speculation since the Petitioner had not yet given his statement.

CONCLUSION

In summary, it is respectfully submitted that the Court should deny a writ of certiorari in this case. The Supreme Court of Ohio correctly decided the issues with respect to the constitutionality of Ohio's statutory scheme which allows for the imposition of the death penalty. This Court's decisions of July 2, 1976, concerning the death penalty were considered and correctly applied by the Supreme Court of Ohio. Accordingly, Respondent respectfully asks this Court to deny the writ of certiorari in this case.

Respectfully submitted,

SIMON L. LEIS, JR.
Prosecuting Attorney

LEONARD KIRSCHNER
Assistant Prosecuting Attorney

ROBERT R. HASTINGS, JR.
Assistant Prosecuting Attorney

WILLIAM P. WHALEN, JR.
Assistant Prosecuting Attorney

CLAUDE N. CROWE
Assistant Prosecuting Attorney

420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202

Attorneys for Respondent

APPENDIX A

CONSTITUTION OF THE UNITED STATES

AMENDMENT VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an imparital jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

OHIO REVISED CODE

E. Complicity. § 2923.03, R.C.

1. Text of § 2923.03, R.C., eff. 1-1-74.

§ 2923.03. (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

(1) Solicit or procure another to commit the offense;

(2) Aid or abet another in committing the offense;

(3) Conspire with another to commit the offense in violation of § 2923.01, R.C.;

(4) Cause an innocent or irresponsible person to commit the offense.

(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of § 2923.02, R.C.

(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.

(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

§ 2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2929.02 Penalties for murder

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

§ 2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which

may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three

judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

APPENDIX B

APPELLATE RULES

RULE 4. Appeal as of right — when taken

* * *

(B) Appeals in criminal cases. In a criminal case the notice of appeal by a defendant shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within thirty days after the entry of an order denying the motion. A motion for a new trial on the ground of newly discovered evidence, made after expiration of the time for filing a motion for new trial on other grounds, will not extend the time for appeal from a judgment of conviction. In an appeal by the prosecution, the notice of appeal shall be filed in the trial court within thirty days of the date of the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is filed with the clerk of the trial court for journalization.

RULE 5. Appeals by leave of court in criminal cases

(A) Motion and notice of appeal. After the expiration of the thirty day period provided by Rule 4 (B) for the

filing of a notice of appeal as of right in criminal cases, an appeal may be taken only by leave of the court to which the appeal is taken. In such event, a motion for leave shall be filed with the court of appeals setting forth the reasons for the failure of the appellant to perfect an appeal as of right and setting forth the errors which the movant claims to have occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by such parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. Concurrently with the filing of the motion the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by Rule 3 and file a copy of the notice of appeal in the court of appeals. The movant shall also furnish a copy of his motion and a copy of the notice of appeal to the clerk of the court of appeals who thereupon shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the prosecution, who may, within thirty days from the filing of the motion, file such affidavits, parts of the record and brief or memorandum of law to refute the claims of the movant.

(B) Determination of the motion. Except when required by the court the motion shall be determined by the court of appeals on the documents filed without formal hearing or oral argument.

(C) Order and procedure following determination. Upon determination of the motion, the court shall journalize its order and the order shall be filed with the clerk of the court of appeals, who thereupon shall certify a copy of the order and mail or otherwise forward the copy to the clerk of the trial court. In the event that the motion

for leave to appeal is overruled the clerk of the trial court shall collect the costs pertaining to the motion, in both the court of appeals and the trial court, from the movant. In the event that the motion is sustained and leave to appeal is granted the further procedure shall be the same as for appeals as of right in criminal cases, except as otherwise specifically provided in these rules.

RULE 12. Determination and judgment on appeal

(A) Determination. In every appeal from a trial court of record to a court of appeals, not dismissed, the court of appeals shall review and affirm, modify, or reverse the judgment or final order of the trial court from which the appeal is taken. The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16, on the record on appeal as provided by Rule 9, and, unless waived, on the oral arguments of the parties, or their counsel, as provided by Rule 21. Errors not specifically pointed out in the record and separately argued by brief may be disregarded. All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision.

CONSTITUTION OF THE STATE OF OHIO
Art. IV, § 2

§ 2. Supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B) (4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor. (Amended by 132 v HR 42, eff. 5-7-68; 120 v 743)

APPENDIX C

OPINION OF THE SUPREME COURT OF OHIO REPORTED AT 48 OHIO ST.2d 270, 358 NE2d 556

THE STATE OF OHIO, APPELLEE, v. BELL, APPELLANT.

[Cite as State v. Bell (1976), 48 Ohio St. 2d 270.]

Criminal law – Aggravated murder – Imposition of death penalty – Waiver of jury trial – R. C. 2929.03 (C) (1), (2) and (E) – Constitutionality – Mitigation hearing – Relevant factors.

1. A defendant is not coerced or impelled to waive his constitutional right to jury trial by R. C. 2929.03 (C) (1), (2) and (E), under the provisions of which an offender who waives a jury trial need persuade only one member of the three-judge panel at the mitigation hearing to avoid imposition of the death penalty.

2. Relevant factors such as the age of the defendant and prior criminal record are among those to be considered by the trial judge or three-judge panel in determining whether the existence of a mitigating circumstance pursuant to R. C. 2929.04 (B) (2) and (3) was established by a preponderance of the evidence.

(No. 76-499—Decided December 22, 1976.)

APPEAL from the Court of Appeals for Hamilton County.

On October 16, 1974, at about 11:00 p.m., police discovered Julius Graber lying in the woods in Spring Grove Cemetery in Hamilton County critically injured from a shotgun wound to the back of his head. He was pronounced dead on arrival at the hospital.

Approximately one week thereafter, Willie Lee Bell, defendant-appellant, was arrested for the murder of Julius Graber. Samuel Hall, Bell's companion, was arrested the day after Graber's body was discovered. Bell was then a minor of 16 years of age, and Hall was an adult. Following proceedings in the Juvenile Division of the Court of Common Pleas, Bell was bound over to the Hamilton County Grand Jury and was indicted jointly with Hall on two counts of aggravated murder, under R. C. 2903.01, with specifications of aggravated robbery and of kidnapping pursuant to R. C. 2929.04 (A) (7). Bell entered pleas of not guilty and not guilty by reason of insanity.

Bell and Hall were tried separately. The trial court found Bell to be sane and competent to stand trial, overruled a motion to suppress any inculpatory statements, and accepted Bell's waiver of trial by jury and requested to be tried by a three-judge panel.

The record tends to reveal the following series of events. On October 16, 1974, Bell and Hall went to a community center in Cincinnati, following which they went to Hall's home to borrow his brother's Grand Prix Pontiac automobile. In that car, Bell and Hall proceeded to Victory Parkway, where they observed a 1974 blue Chevrolet. When the Chevrolet turned into a parking garage, Hall, driving his brother's car, did the same, and followed it to the second level of the garage. After the Chevrolet was parked, Hall got out of the Pontiac with a 20-gauge "sawed-off" shotgun and accosted the Chevrolet's driver, 64-year-old Julius Graber. Graber was forced into the trunk

of his own vehicle, and Hall drove that car, with Bell following in the Pontiac, and parked it near his home. Bell parked the Pontiac at Hall's home, and then drove Graber's Chevrolet toward Spring Grove Cemetery. After driving past the cemetery, Bell stopped, reversed direction, and then backed the car into a lane that went inside the cemetery premises.

At this point, Robert Pierce, Jr., a resident of an apartment building near the cemetery, had just returned from work and was sitting in the parking lot of the building listening to his car radio. Pierce observed a vehicle stopped in the cemetery with its parking lights on. He heard two car doors close, one after the other, turned his radio down to listen, and then heard a voice plead "Don't shoot me. Don't shoot me." Pierce turned his radio off, and shortly thereafter heard one shot, followed, after an interval, by a second shot. He then saw the interior light of the car go on, and a man enter the parked car on the passenger side and move behind the wheel. Pierce heard two car doors close, saw the interior light go off, and then watched the car leave the cemetery, without any lights. Pierce called the police, around 10:50 p.m., who subsequently discovered Graber.

Hall and Bell drove to Dayton, where they spent the night in the Graber Chevrolet. The following morning, Bell driving, they stopped at a service station to ask directions for finding work. After questioning the attendant, Bell and Hall left, but shortly returned. Hall then thrust a shotgun at the attendant, Kenneth B. Hardin, took the keys to Hardin's automobile, forced him into the trunk of his car, and drove it away from the station. Bell followed in Graber's Chevrolet. The Hardin car, however, was stopped by a State Highway Patrolman, and when Hardin pounded on the trunk lid, he was discovered and

released by the officer. Hall was arrested, and the shotgun was found and removed from the car's interior. Meanwhile, Bell, who was still following, proceeded back to Cincinnati, abandoned the Chevrolet on Beatrice Avenue, and returned to his residence on Preston Avenue.

Approximately one week later, following the interrogation of Hall and other investigative effort, Cincinnati police appeared at the Bell residence. Bell was taken to police headquarters to answer questions in connection with the Hall investigation and was given his *Miranda* warnings. When the answers to preliminary questions indicated a possible connection with Hall, Bell was again given his *Miranda* warnings. Approximately one hour later, Bell was given his *Miranda* warnings a third time on a printed "Notification of Rights" form, whereupon he signed the "Waiver of Rights" portion. Bell was asked to make a recorded statement, and was advised that he could have his mother present. Although Bell indicated that he did not want his mother present, the officer called Bell's mother to tell her that her son was involved in a homicide, a kidnapping and an armed robbery, and that he was going to be charged with the offenses. An offer was made to transport her to headquarters to be with her son when he made his statement, but she declined.

A recorded statement was taken from Bell which was eventually received in evidence. It confirmed most of the above factual details, but denied any intention of Bell to take part in a homicide. Bell conceded his presence during the kidnapping of Graber, but claimed he was not aware of the shotgun until Hall got out of the Pontiac in the parking garage to threaten Graber with it. Bell conceded driving Graber's car to the cemetery and backing into the cemetery lane, but insisted that it was Hall who removed Graber from the trunk, and that it was Hall who

took Graber into the bushes. Bell said he then heard a shot and Graber pleading for his life. After the first shot, according to Bell's recorded statement, Hall ran back to the vehicle to get another shotgun shell and then returned to the bushes, whereupon Bell heard the second shot. Hall then drove Bell to Dayton where the incident with the service station attendant occurred. In his statement, Bell attributed the active part of the incident to Hall, but admitted following Hall in Graber's Chevrolet for some 20 minutes before Hall was stopped by the highway patrolman.

Additional expert testimony identified a shell casing found at the scene of the homicide as having been fired from the shotgun found in the car Hall was driving at the time of his arrest in Dayton, and also identified a latent fingerprint from the outside window on the driver's side of the Graber car as being that of Bell's.

After Graber had been pronounced dead at the hospital, where attendants discovered that he had secreted money and other valuables in his shoes, his body was taken to the morgue. A post-mortem examination revealed that death had resulted from a wound to the rear of the head inflicted by a shotgun shell at near-contact range. Testimony established that the head and hand wounds Graber received were consistent with the theory that the fatal shot was fired while Graber's hands were clapsed behind his head.

The defense offered only one witness, a Columbus police officer who had interrogated and taken several statements from Hall. The statements were not, however, offered in evidence at the trial, and the case went to the panel on the basis of the evidence presented by the prosecution.

At the conclusion of trial, the panel unanimously found

Bell guilty of aggravated murder as charged on the second count of the indictment, and guilty of the specification to the second count, that the aggravated murder was committed during a kidnapping. Bell was also found guilty of the third and fourth counts of aggravated robbery and of kidnapping, respectively.

Following pre-sentence and psychiatric examination a mitigation hearing was held pursuant to R. C. 2929.03, *et seq*. The panel found that none of the mitigating circumstances specified in R. C. 2929.04 (B) had been established by a preponderance of the evidence. Bell was sentenced to 7 to 25 years on the kidnapping charge; to 7 to 25 years on the aggravated robbery charge, to run consecutively with the first sentence; and to death by electrocution on the aggravated murder charge.

The Court of Appeals affirmed the judgment of the trial court, and the cause is now before this court as a matter of right.

Mr. Simon L. Leis, Jr., prosecuting attorney, *Mr. Robert Hastings, Jr.*, and *Mr. William P. Whalen, Jr.*, for appellee.

Mr. H. Fred Hoefle and *Mr. Thomas A. Luken*, for appellant.

Paul W. Brown, J. Appellant Bell raises ten propositions of law. The first three of these assert that Ohio's statutory scheme for the imposition of the death penalty is unconstitutional. That issue was decided by this court in *State* v. *Bayless* (1976), 48 Ohio St. 2d 73, and need not be reconsidered here. Those propositions of law are overruled.

Appellant asserts in his fourth proposition of law that he was unconstitutionally coerced into waiving his right to

trial by jury by the provisions of R. C. 2929.03 (C) (1), (2) and (E) which provide that if a defendant is tried by jury and convicted, then the trier of fact at the mitigation hearing is the one trial judge who presided over the jury trial; but, if the defendant is tried by a three-judge panel following a waiver of a jury trial, then the trier of fact at the mitigation hearing is the same three-judge panel.

Appellant contends that this statutory scheme coerces defendants, and coerced him, into waiving their right to trial by jury. Before a three-judge panel can impose the death penalty, it must unanimously find that the defendant has failed to establish the existence of one or more of the mitigating circumstances enumerated in R. C. 2929.04 (B). Thus, if tried before a panel, a defendant need convince only one judge out of three that such mitigation existed. If, however, a defendant elects a jury trial, he must convince the sole trial judge at the penalty proceedings that a mitigating circumstance existed. Appellant asserts that this scheme impels defendants to select trial by panel, rather than by jury, because the dread of the death sentence is an overwhelming consideration.

A statutory scheme which deliberately or unintentionally chills the right to trial by jury cannot constitutionally be tolerated. Appellant relies on *United States* v. *Jackson* (1968), 390 U. S. 570, in which the United States Supreme Court held that a federal statute had such an impermissible chilling effect because it allowed the death penalty in kidnapping cases where trial was by jury, but did not permit the death penalty where trial was by the court.

However, unlike the statute in *Jackson*, the death penalty is possible under the Ohio statute under both alternatives, and it may be avoided under both alternatives. Thus, we are confronted with only the arguably greater possibil-

ity of the avoidance of the death penalty by the requirement of unanimity within the panel, and not with its absolute avoidance as in *Jackson*.

Although appellant asserts that there is a greater possibility of convincing one of three judges on a panel of a mitigating factor than one judge alone, by the same logic, there is also a greater possibility of convincing one or more of 12 jurors of the absence of evidence of guilt beyond a reasonable doubt than so convincing one of three judges. If the first consideration inclines against a jury trial, then the latter inclines toward one. The balance struck by these competing considerations is for the judgment of the defendant and competent trial counsel.

As noted, this statutory scheme furnishes a choice for defendants. Presumably, if no choice were offered, coercion would not be alleged by appellant. We see nothing unreasonable or coercive in the statute: there are pros and cons with respect to each alternative. If a defendant feels uncomfortable with a jury as the trier of fact at trial and the trial judge as the trier of fact at the mitigation hearing, then he may elect a three-judge panel as the trier of fact for all the proceedings. We see nothing objectionable in providing the defendant with a choice, absent, of course, an allegation of ineffective trial counsel. No such allegation was here made.

Further, the Court of Appeals concluded from statistics in Hamilton County that, in actual practice, this statutory scheme does not coerce or impel a defendant to waive jury trial. We are presented with no contrary evidence. Appellant's fourth proposition of law is overruled.

Appellant asserts in his fifth proposition of law that a statement by a juvenile cannot be used against him at trial unless both he and his parents or guardian were informed of his *Miranda* constitutional rights, and unless

the minor was given the opportunity to consult with his parents, guardian or attorney as to whether he should waive those rights.

Appellant cites Indiana case law and apparently concedes that this proposition has no support in Ohio authorities. We decline his invitation to alter existing Ohio law. We perceive no requirement in *Miranda* that the parents of a minor shall be read his constitutional rights along with their child, and that, by extension, both parent and child are required to intelligently waive those rights before the minor makes a statement. Appellant's mother was given every opportunity to be with her son, and, after declining, her presence cannot be forced by police.

When a minor is sought to be interrogated, the question of whether he intelligently and voluntarily waives his rights cannot always be decided by the same criteria applied to mature adults. See *Haley* v. *Ohio* (1948), 332 U.S. 596; *In re Gault* (1967), 387 U.S. 1. Such criteria necessarily varies with certain factors as the age, emotional stability, physical condition, and mental capacity of the minor. Appellant was adjudicated competent to stand trial as an adult, and thus is not afforded as much protection as a very young or disabled child who is not as capable of intelligently waiving his rights.

We are impressed with the meticulous care with which the police approached appellant's rights. Appellant was advised of his rights three times, and, the last time, was asked whether he understood them. He indicated that he did, and signed a waiver of those rights. Appellant was informed further by the officer that he could have his mother present while making his statement, but he indicated he did not wish her present. The officer nonetheless phoned appellant's mother and informed her that her son was being held for involvement in a homicide, an armed

robbery and a kidnapping, and asked further if she would like to be present when her son gave a statement. The officer offered her transportation to and from police headquarters, but she declined this offer along with the opportunity to be present at the interrogation. After being informed of this conversation, appellant again declined to have his mother present when he gave his statement.

Upon review of the record, we find that the prosecution satisfied its burden of proving that the inculpatory statement by the minor appellant was made pursuant to an intelligent and voluntary waiver of his constitutional rights of which he was fully adviser, giving due regard to the requirement that a minor be given even more scrupulous attention to the issues of voluntariness and understanding than an adult. Appellant's fifth proposition of law is overruled.

In his sixth proposition of law, appellant asserts that a juvenile's statement is involuntary and may not be used against him if both he and his parents or guardian have not been advised that he may suffer the death penalty with the use by the prosecution of the statement, and if he and his parents or guardian have not been advised that he may lose the protection of the Juvenile Court.

We find this proposition without merit. Appellant has cited no authority from any jurisdiction that supports it. The officer related to appellant's mother all of his knowledge at that point: that appellant was being held in connection with a homicide, a kidnapping and an armed robbery. Any further advice by the officer concerning the death penalty or Juvenile Court would have been pure, and perhaps improper, speculation since appellant had not yet given his statement. Accordingly, the sixth proposition of law is overruled.

Appellant argues in his seventh proposition of law that one who participates in an armed robbery and a kidnapping is not guilty of aggravated murder where the other participant takes the victim out his presence and deliberately kills him, absent evidence of the first participant's purpose to kill, or that he aided and abetted the actual slaying with the intent that the victim die.

Clearly there is ample evidence that appellant affirmatively assisted and acted to complete the murder. Appellant's denial could be reasonably disbelieved after considering all relevant circumstances, especially that Hall was arrested the next day with a would-be victim in the trunk and appellant following in another car, presumably attempting to carry out the same scheme of murder.

The foregoing evidence is sufficient to sustain a finding of guilt because, under R. C. 2923.03 (A) (2) and (F), one who aids and abets another in committing an offense is guilty of the crime of complicity, and may be prosecuted and punished as if he were the principal offender.

But, in this capital case, this proposition need not be overruled solely on the above grounds. The panel was not required to accept appellant's version of the murder. As the trier of fact, it was within the province of the panel to determine which was the credible evidence. Thus, the gist of appellant's seventh proposition is that the conviction of aggravated murder was contrary to the manifest weight of the evidence. Upon review of the entire record, we hold that there was ample, credible evidence from which the panel could have concluded that appelant actively participated in the murder. Appellant's own statement confirms his involvement in the kidnapping and the armed robbery, and concedes further that, after he drive into the cemetery, he asked Hall what was going to be done next. The court could reasonably disbelieve, as we do, that Graber lay quietly with his hands behind his head while Hall left him

alone to return to his car to reload his shotgun. Evidence of bruises on Graber's body, appellant's statement to police, the physical circumstances of the slaying, and the testimony of the eyewitness Pierce all would have justified the panel's rejection of appellant's version and its conclusion that Bell either committed, or actively assisted in, the murder. The seventh proposition of law is therefore overruled.

Appellant in his eighth proposition of law contends that where the prosecutor fails to advise the defense counsel of the names, addresses and criminal records of witnesses after proper discovery requests, the trial court should not permit those witnesses to testify over objection, or, alternatively, should grant motions to strike such testimony. This proposition is not well taken. The record shows that in most instances the prosecution did not have such information, but orally communicated the information to defense counsel as it was acquired. The trial court carefully examined the possibility of prejudice to appellant, and concluded that no such prejudice existed. This proposition of law is overruled.

Appellant asserts in his ninth proposition of law that a minor is "mentally deficient" within the meaning of R. C. 2929.04 (B) (3), and therefore cannot be sentenced to death after a conviction of aggravated murder with specifications. The Revised Code does not define "mental deficiency"; therefore, unless usurped by a judicial definition, the term must be accorded its common, everyday meaning, keeping in mind that the statutory language defining mitigating circumstances must be strictly construed against the state and liberally construed in favor of the accused. See R. C. 2901.04 (A).

However, we do not agree that a minor is *per se* "mentally deficient" within the meaning of R. C. 2929.04 (B) (3). Such an intention by the General Assembly could have easily been provided for by clear and simple language.

Upon review of the statute, we do not believe the General Assembly intended that a 17-year-old defendant is conclusively "mentally deficient." The ninth proposition of law is overruled.

In his tenth proposition of law, appellant alternatively argues that even if a minor is not *per se* "mentally deficient," for purposes of R. C. 2929.04 (B) (3), the circumstances of this case establish by a preponderance of the evidence that the offense was a product of his mental deficiency, and that the imposition of the death penalty was error.

In considering this proposition, we will not limit ourselves, as appellant has, to the mitigating circumstances of mental deficiency. R. C. 2929.04 (B) states:

"Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence [*sic*] of the evidence:

"(1) The victim of the offense induced or facilitated it.

"(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

"(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

The purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration for the individual offender and his crime. *State* v.

Woods (1976), 48 Ohio St. 2d 127. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. *Williams* v. *New York* (1949), 337 U.S. 241, 247.

We will examine each of the three mitigating circumstances provided for in R. C. 2929.04 (B) to determine if the evidence established that such a mitigating factor existed.

We need not spend much time or effort, though, in discussing R. C. 2929.04 (B) (1) as there was no evidence whatsoever that the victim induced or facilitated the crime.

However, the two remaining mitigating circumstances merit consideration. It has been alleged that the mitigating circumstances under R. C. 2929.04 (B) are unconstitutionally narrow because a number of very important factors, such as the age and criminal record of the defendant, appear to be irrelevant under the statute. We believe, however, that the Ohio statutory scheme can withstand this attack. The Ohio statutes, properly construed, permit the trial judge or panel to consider these factors at the mitigation hearing. Such a statutory construction is evident as R. C. 2929.04 (B) states that "the death penalty * * * is precluded when, considering the nature and circumstances of the offense *and the history, character, and condition of the offender*" (emphasis added), one or more of the mitigating circumstances is established. This conclusion is buttressed by the requirement that these statutory provisions be liberally construced in favor of the accused.

As used in R. C. 2929.04 (B) (2), the terms "duress" and "coercion" are to be construed more broadly than when used as a defense in criminal cases. See *State* v. *Woods* (1976), 48 Ohio St. 2d 127.

There was evidence in the psychiatric reports that appellant was perhaps easily led by Hall. When combined with appellant's age, it is conceivable that all characteristics could establish the mitigating circumstances defined by R. C. 2929.04 (B) (2). However, we believe the panel was justified and correct in finding that this mitigating circumstance was not established by the evidence. Even if it were believed that appellant was apprehensive of Hall and was "forced" to go along with the crimes, the hard fact remains that appellant could have very easily quit the scheme while following in another car. Further, it must be remembered that appellant and Hall were engaged in the same type of scheme the very next day when Hall was arrested. We agree with the panel that, after considering all relevant factors, the second mitigating circumstance was not established.

The third and final mitigating circumstance in the statute concerns the offender's psychosis or mental deficiency. While rejecting appellant's claim that a minor defendant is *per se* "mentally deficient," we do hold that a defendant's age is a primary factor in determining the existence of a mental deficiency. Senility, as well as minority, may well be relevant, and therefore properly considered, in determining whether the offense was a product of mental deficiency.

The sum of the evidence and testimony of the psychiatrists, psychologists, probation department, school authorities and others fails to sustain appellant's position that he suffered from a mental deficiency. Appellant's situation was unpleasant but not unfamiliar: an unsatisfactory home, absence of family or other supervision, drug involvement, and inability to cope with school demands. Even when considered together with defendant's minority, all the factors do not establish a "mental deficiency" for purposes of R. C. 2929.04 (B) (3). Although appellant's environ-

ment was indeed undesirable, such conditions do not excuse or even mitigate aggravated murder. To hold otherwise would set a dangerous and misleading precedent for future defendants. We therefore agree with the panel and the court below that the aggravated murder was not the product of appellant's psychosis or mental deficiency, and therefore overrule appellant's tenth proposition of law.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE and W. BROWN, JJ., concur.

OPINION OF THE COURT OF APPEALS, FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO, NOT YET REPORTED.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-75068

STATE OF OHIO,
Plaintiff-Appellee,
v.
WILLIE LEE BELL,
Defendant-Appellant.

OPINION

(Filed April 12, 1976)

**Appeal From The Court of Common Pleas
Hamilton County, Ohio**

Messrs. Simon L. Leis, Jr., Robert R. Hastings, Jr., and William P. Whalen, Jr., 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Messrs. Thomas A. Luken, 1003, First National Bank Building, 105 East Fourth Street, Cincinnati, Ohio 45202, and H. Fred Hoefle, 400 Second National Bank Building,

830 Main Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

PALMER, J. At about 11:00 P.M. on the evening of October 16, 1974, Julius Graber was discovered by police lying in Spring Grove Cemetery in Hamilton County, Ohio, critically injured from a shotgun wound at the back of his head. He exired in the ambulance on the way to the hospital. Approximately one week thereafter, the defendant-appellant, Willie Lee Bell, then a minor of 16 years of age, was arrested together with one Samuel Hall, an adult, for the murder of Julius Graber. Following proceedings in the Juvenile Division, not here in issue, Bell was bound over to the Hamilton County Grand Jury and was jointly indicted with Hall on two counts of aggravated murder contrary to R. C. 2093.01, with specifications of aggravated robbery and of kidnapping, and on separate counts of aggravated robbery and kidnapping. Counsel was assigned the indigent Bell, and pleas of not guilty and not guilty by reason of insanity were entered.

In subsequent proceedings, the trial court found Bell to be sane and competent to stand trial, overruled a motion to suppress an inculpatory statement, and accepted Bell's waiver of trial by jury and request to be tried by a three-judge panel. Trial then ensued, separate from that of Hall, at the conclusion of which the court unanimously found Bell guilty of aggravated murder as charged in the second count of the indictment, and guilty of the specification to the second count, viz., that the aggravated murder was committed while Bell was committing kidnapping. He was also found guilty of the third and fourth counts of aggravated robbery and of kidnapping, respectively. Following pre-sentence and psychiatric examinations, a hearing on mitigating circumstances was held by the panel pursuant to R. C. 2929.03 et seq., at the conclusion of which

the panel unanimously found that none of the mitigating circumstances specified in R. C. 2929.04 (B) had been established by a preponderance of the evidence. Sentence, including death by electrocution, was then pronounced and entered.

Appeal was timely filed, and counsel provided for appellant to prosecute this appeal. Nine assignments of error are presented, have been vigorously argued, and will be discussed serially *infra,* following a review of such of the evidence produced during the trial and antecedent proceedings as is necessary to provide a fundament for the disposition of the various questions of law raised thereby.

The record reveals a body of evidence adduced on behalf of the State, resulting from the testimony of some 20 witnesses and including the recorded statement of Bell, which tends to establish the following series of events. Earlier in the evening of October 16th, Bell and Hall had met at a youth center in Cincinnati to thereafter leave for Hall's home, where the latter borrowed his brother's Grand Prix Pontiac. After briefly stopping at a White Castle restaurant, the two proceeded to Victory Parkway, falling in column behind a 1974 blue Chevrolet. When the Chevrolet turned into a parking garage, Hall, driving his brother's car, did the same, to follow the leading vehicle to the second floor of the garage. After the Chevrolet was parked, Hall got out of the Pontiac with a 12 gauge "sawed off" shotgun and accosted the Chevrolet's driver, who proved to be Mr. Graber, the 64 year old director of the Glen Manor Home for the Aged. Graber was forced into the trunk of his own vehicle, and Hall drove their unwilling passenger, with Bell following in the Pontiac, to Dana Avenue, where the Pontiac was then parked. Bell next entered Graber's Chevrolet and began driving it in the direction of Spring Grove Cemetery. At shortly before

11:00 P.M., Bell drove past an entrance to the cemetery, stopped and reversed directions, and backed the Chevrolet up a lane inside the cemetery premises.

At this point, one Robert Pierce, a resident of an apartment building on Groesbeck Avenue, near the cemetery, had just returned from work and was sitting in the parking lot of his building in his automobile listening to the conclusion of a baseball game. Through opened windows, he observed a vehicle stopped in the cemetery with its parking lights on. He then heard two car doors close, one after another, turned his radio down to listen, and heard a voice screaming "Don't shoot me; don't shoot me." He turned his radio off, and shortly thereafter heard one shot, followed after an interval by a second shot. He then saw a man enter the parked car on the passenger side to place himself behind the wheel. He heard two car doors closing, saw the parking lights extinguished, and watched the car proceed, without lights, out of the cemetery and onto Gray Road and away. At about 11:00 P.M. this witness called the police, who shortly thereafter discovered Mr. Graber, with the results heretofore related.

After Graber had been pronounced dead at the hospital, his body was removed to the morgue, where attendants discovered that he had secreted money and other valuables in his shoes. A post-mortem examination revealed that death had resulted from a wound at the rear of the head delivered by a shotgun held at near-contact range. Numerous pellets of #5 shot were removed from the body, and testimony was received that the wounds, to hand and head, were consistent with the fatal shot having been delivered while Graber's hands were clasped behind his head.

Following the fatal incident, Hall and Bell drove to Dayton, Ohio, where they spent the night in the Graber Chevrolet. The next morning, with Bell driving, they

stopped at a service station in Dayton where they made certain inquiries of the attendant, one Kenneth Hardin, about finding work. After conversation, Bell and Hall left, but returned following a short interval. Hall then thrust a shotgun at Hardin, relieved him of the keys to his automobile, forced Hardin into its trunk, and drove it away from the station. Bell followed in Graber's Chevrolet. The Hardin car, however, was stopped by a State Highway Patrolman for a defective muffler, and when Hardin pounded on the trunk lid, he was released by the officer. Hall was arrested and the shotgun removed from the vehicle's front seat. Bell, meanwhile, who still was following in the Graber Chevrolet when Hall was stopped, proceeded back to Cincinnati to abandon the Chevrolet on Beatrice Avenue (near his own residence on Preston Avenue) to which he then returned.

Approximately one week later, following the interrogation of Hall by officers of various police departments and other investigative effort, Cincinnati police appeared at the Bell residence. Bell was taken to police headquarters to answer questions in connection with the Hall investigation and, when the answers to preliminary questions indicated a possible connection with Hall, was given the first of several *Miranda* warnings. Bell was asked to make a recorded statement and instructed, in connection therewith, that he could have his mother present with him when he made any statement, if he so desired. Although Bell declined, the officer nevertheless called his mother to tell her that her son was involved in a homicide, kidnapping and robbery with Hall, and that he was going to be charged with the offenses. An offer was made to transport her to headquarters to be with her son when he made his statement. She declined to come to headquarters.

A statement was then taken from Bell, to eventually be received into evidence. It confirmed most of the factual

details related above, but denied any intention of Ball to take part in a homicide. Bell conceded his presence during the kidnapping of Graber, but said he did not know of the presence of the shotgun until Hall got out of the Pontiac to threaten Graber with the weapon. He conceded driving Graber's vehicle to the cemetery and backing up into the cemetery lane, but insisted that it was Hall who removed Graber from the trunk, and Hall who took him "in the bushes and I heard a shot and I heard this man crying, telling Sam, 'Don't shoot anymore.' " T. p. 340. After the first shot, according to Bell, Hall ran back to the vehicle to get another shell for the shotgun and then returned to the bushes, whereupon Bell heard the second shot. Hall then drove the pair, according to the statement, to Dayton where the incident with the service station operator occurred. Bell attributed the active part of these proceedings to Hall, but admitted following Hall in Graber's Chevrolet while the two vehicles were driven some 20 minutes before Hall was stopped by the highway patrolman.

Additional expert testimony identified a shell casing found at the scene of the homicide as having been fired from the shotgun found on Hall at the time of his arrest in Dayton, and identified a latent fingerprint from the outside window of the driver's side of the Graber vehicle as being that of Bell.

The defense offered only one witness, a Columbus police officer who had interrogated and had taken several statements from Hall. The statements were not, however, offered into evidence, and the case went to the panel on the basis of the evidence presented by the State.

I.

The first three assignments of error challenge the constitutional validity of the Ohio dealth penalty provisions, and are phrased as follows:

I. Imposition of the punishment of death is in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States, since it constitutes cruel and unusual punishment.

II. The trial court erred in overruling the "Motion for an Order Declaring the Death Penalty Unconstitutional, Dismissing the Specification of Aggravating Circumstances from the Indictment and Sentencing Defendant to Life Imprisonment for His Conviction of Aggravated Murder."

III. The death penalty to which appellant was sentenced offends contemporary standards of decency and constitutes cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States.

The first two of these concededly raise questions which are for all practical purposes identical, were therefore argued together, and will be similarly treated here. Appellant urges, under these assignments, that the Ohio death penalty provisions failed to cure the infirmities found by at least three of the Justices constituting the majority of the United States Supreme Court in *Furman* v. *Georgia,* 408 U.S. 238 (1972) to fatally infect similar legislation and that the Ohio statutory scheme for the punishment of murder contained in R. C. 2929.02 et seq., enacted effective January 1, 1974, failed to eliminate those elements of arbitrary, rare, and discriminatory application which call down the prohibitions of the Eighth and Fourteenth Amendments. Appellant points, among other things, to the continuing presence of such variable elements as grand jury discretion to indict for capital or non-capital version of the same offense, prosecutor discretion in bringing matters to the grand jury and in plea-bargaining proceedings thereafter, discretion in the Juvenile Division in whether it elects to retain or abjure jurisdiction over a juvenile

offender, judicial discretion in finding the presence or absence of aggravating circumstances and/or mitigating circumstances under R. C. 2929.04 (A) and (B), and, finally, discretion in the exercise of executive clemency.

The third assignment of error argues the *per se* invalidity of the death penalty under the Eighth and Fourteenth Amendments, urging us to adopt the view that "contemporary knowledge and standards of decency" have demonstrated the "inutility" of the measure as a detriment to crime, and have manifested a more sophisticated approach to the retributive aspects of punishment, as well as a greater knowledge of the possibilities of rehabilitation. These and other factors, argues the appellant, have led to a growing reluctance to resort to this last enormous and irreversible step, a reluctance which, given the progressive non-static nature of the concept of "cruel and unusual punishment," has finally succeeded in the last half of this century in bringing that mode of punishment within the prohibition of the Amendment.

This argument, while not lacking in legal or humanitarian interest, fails on several grounds, it seems to us. First, it is difficult indeed to derive comfort from the Eighth Amendment as the source of an implied constitutional prohibition of the death penalty, when both the Fifth and Fourteenth Amendments *expressly* contemplate and forgive its use when accompanied by due process of law:

> No person shall be held to answer for a *capital,* or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person . . . *be deprived of life* . . . without due process of law. . . .
>
> . . . nor shall any State *deprive any person of life* . . . without due process of law . . . .

To similar effect, see Sections 9 and 10, Article I of the Ohio Constitution.

Secondly, we are unable to derive any dispositive or even persuasive support for this argument from the final arbiters of all such arguably problematical constitutional language, the United States Supreme Court. In the *Furman* case, only two of the nine Justices stated unequivocal support for the proposition here advanced by appellant; the balance of the Justices either supported the constitutionality of the death penalty legislation in question, or found it lacking in detail but not necessarily in principle. Historically, of course, the appropriate use of the death penalty has judicial approbation. As Mr. Justice Douglas remarked in *Furman*:

> It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous. *In re Kemmler,* 136 U.S. 436, 447.
> 408 U.S. at 241.

See also *Wilkerson* v. *Utah,* 99 U.S. 130, (1878); *Louisiana ex rel. Francis* v. *Resweber,* 329 U.S. 459 (1947).

In sum, the arguments (and examples) offered by appellant to sustain his first three assignments of error are indistinguishable from those made to us and rejected by us in the recently decided cases of *State* v. *Reeves,* No. C-75022 (1st Dist., January 26, 1976) and *State* v. *Woods,* No. C-75047 (1st Dist., January 26, 1976), and require overruling on authority thereof. We note, in passing, the similar result reached by the Court of Appeals for Franklin County, Ohio, in *State* v. *Harris,* No. 74AP-580, decided June 10, 1975, and *State* v. *Royster, aka Shaw,* No. 75AP-195, decided August 26, 1975, both unreported, and cite with approval the language of Judge Whiteside in his concurring opinion in the *Harris* case:

> Regardless of one's personal views as to whether the death penalty should be used as punishment for crime, the only conclusion consistent with the Constitution itself is that the death penalty is not *per se* unconstitutional, and that the Legislature has the power to provide for the imposition of the death penalty so long as the means of imposition, the manner of determining when it is to be imposed, and the offenses for which it is imposed are neither discriminatory nor constitute cruel and unusual punishment. The mandatory Ohio death penalty, limited in its application to only the most serious types of aggravated murder, and predicated upon detailed factual determinations both as to guilt and mitigating circumstances, meets the constitutional test so as to neither be discriminatory nor constitute cruel and unusual punishment.

The first three assignments of error are overruled.

II.

The appellant's fourth assignment of error is phrased as follows:

> IV. Appellant was unconstitutionally coerced into waiving his right to trial by jury by the provisions of §§ 2929.03 and .04, R.C.

The argument here proceeds from the factual circumstance providing for the separation, under the Ohio statutes, of the trial to determine *guilt* pursuant to R. C. 2903.01 and 2929.03, from the trial to determine the *penalty* pursuant to R. C. 2929.03 and .04 The determination of guilt of both the offense and the specification of aggravating circumstance is by verdict of a jury unless waived in writing by the defendant, in which event it is by verdict of a three-judge panel. If a jury is not waived, the determination of penalty is made by the trial judge who presided over the jury trial. If, however, a jury *is* waived, the

penalty is determined by the three judge panel which determined his guilt, under the following procedure:

> . . . if the court finds, or if the panel of three judges *unanimously* finds that none of the mitigating circumstances listed in division (B) of Section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.
> R. C. 2929.03 (E) (Emphasis added).

Thus, if the defendant succeeds in convincing only one of the three judges on the panel that one or more of the mitigating circumstances listed in R. C. 2929.04 (B) has been established by a preponderance of the evidence, the defendant will escape a sentence of death, as opposed to the argued greater difficulty in so convincing a single sentencing judge. This circumstance, argues the appellant, impels him to select trial by panel rather than trial by jury; the dread of a death sentence is so overwhelming in its compulsion, argues appellant, that it carries all other considerations before it, including what would otherwise constitute a clearly favorable and generally dispositive consideration, viz., the necessity of determining guilt beyond a reasonable doubt by the unanimous verdict of twelve jurors.

Clearly, the creation of a statutory scheme which deliberately, or effectively, even where unintended, discourages or chilled to any substantial degree the undoubted right of a citizen of this State or of the United States to trial by jury of a criminal offense of the instant magnitude, could not constitutionally be tolerated. In *United States* v. *Jackson,* 390 U.S. 570 (1968) relied upon by appellant, the United States Supreme Court had before it a federal statute (18 U.S.C. § 1201 (A)) which it determined to have precisely such discouraging effect. There, however,

the statute providing punishment for conviction of kidnapping made the death penalty possible where trial was by jury, but unavailable where trial was by the court.[1] As was appropriately pointed out by Mr. Justice Stewart, speaking for the Court:

> One fact at least is obvious from the face of the statute itself . . . the defendant's assertion of the right to jury trial may cost him his life, for the federal statute authorizes the jury — and only the jury — to return a verdict of death.
> 390 U.S. at 572.

His waiver of trial by jury, on the other hand, and without more, spared his life. No such dramatic and compelling dichotomy is present in the statutes under review. Death is possible under either alternative, and it may be avoided under both alternatives under the Ohio statutes. Unlike *Jackson*, it is only in the arguably greater *possibility* of avoidance of death growing out of the requirement of unanimity within the panel, and not to its absolute avoidance, that appellant may find any comfort in R. C. 2929.03 (E). Presumably, and paradoxically, appellant would find no constitutional flaw if the statute required the three judge panel to unanimously find the *presence* of a mitigating factor before it could avoid imposing death; but it may reasonably be doubted that this logic would in truth commend itself to the defendant anymore than it did to the General Assembly.

We do not, for these reasons, find *Jackson* to be controlling or persuasive authority for the question at issue.

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[1] This statute . . . creates an offense punishable by death "if the . . . jury shall so recommend." The statute sets forth no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or upon one who pleads guilty.
390 U.S. at 571.

However, we do not wish to be understood as holding that a penalty or other statute which strongly inclined rather than actually coerced a defendant into waiving his right to a jury trial, would escape the most searching scrutiny as to constitutional rectitude. There are obviously more ways of inducing conduct than bludgeoning someone over the head; statutes may be subtly as well as patently offensive. Were we, therefore, able to conclude from our reading of the statutes in question, or from our experience in dealing with them, that they were so designed, or that they so worked in practice, as to persuasively incline or induce a defendant toward a waiver of the constitutional right to trial by jury that he would otherwise be completely free to enjoy, we could follow appellant's argument with greater ease. Such does not appear to be the case here.

First, since our attention is focused by appellant's argument upon the greater possibility of convincing one out of three judges of the existence of mitigating factors than one judge alone, it seems entirely appropriate to note that there is also a greater possibility of convincing one or more out of twelve jurors of the absence of evidence of guilt beyond a reasonable doubt, than so convincing one out of three judges of the same fact. If the first factor inclines against a jury trial, the latter inclines toward it. The balance struck by these competing considerations is one for the judgment of competent trial counsel; we find no unfair tilt toward the latter which would require us to determine that the statutes unconstitutionally chill the right to trial by jury.

Second, we are reinforced in our above analysis by actual experience with the statutes since they became effective January 1, 1974. Thus, since January 1, 1974, there have been a total of 11 indictments for aggravated murder with specifications of aggravating circumstances in Hamilton County. Of this total, 7 were set for trial by jury, and only

4 of the 11 proceeding to trial before a three judge panel pursuant to waiver of jury trial. This scarcely suggests the existence of any substantial coercion or statutory tilt toward inducing jury waivers; to the contrary, it suggests that the balance referred to, supra, is still judged to lie on the side of twelve jurors determining the issue of guilt. The fourth assignment of error is overruled.

III.

The fifth assignment of error challenges the overruling of appellant's motion to suppress his inculpatory statement and its subsequent admission into evidence. The issue raised here is not as to the timing or adequacy of the *Miranda* warnings to Bell, since they were given early, frequently, and correctly, but rather derive from what is conceived to be Bell's special status as a minor:[2]

> Appellant challenges these rulings on the ground that a minor has the constitutional right to have the warnings mandated by *Miranda* v. *Arizona*, 384 U.S. 436, given to his parents as well as to himself before a statement could be taken and used against him, that he had a right to consult with parents and counsel before having to decide whether to waive his *Miranda* rights, and that he had a right to be told, and for his parents to be told, that the possibility existed that the statement might be used in an effort to kill him in the electric chair. In the absence of such warnings made to such persons, and their intelligent and knowing waiver by all such parties, his statement is involuntary and inadmissible.
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> Appellant's brief at 32.

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[2] Bell's birth date was December 12, 1957; he was therefore two months short of 17 when the homicide occurred.

It will be recalled that the interrogating officer who took the statement from Bell testified that he first informed him that he could have his mother present while he made his statement (T. p. 73), that he called the mother and informed her that her son was being held for involvement in a homicide, robbery, and kidnapping (T. p. 73, 74, 107), and further asked her if she would like to be present when he gave the statement. The mother declined the offer of transportation to headquarters, declined the opportunity to be present at the interrogation, and Bell himself again declined to have his mother present when he was informed of this conversation. T. p. 73. After satisfying himself that appellant could read, and had in fact read the card waiving his *Miranda rights,* and that he understood the written and verbal recital of his constitutional rights and had no questions with respect thereto, the interrogating officer took the statement.

We conclude from our review of the record that of the multiple events appellant would attach as conditions precedent to the receipt of incriminating statements from minors — and without commenting or ruling on the propriety or necessity thereof — only two may be said to have been absent in the instant case: no *Miranda* warnings were given to the mother; and no one told her that her son stood in possible jeopardy of the death penalty.[3]

Appellant concedes that neither proposition has support in Ohio authorities, and has cited to us no case from any jurisdiction lending support to the later proposition, which we find to be without merit. Whatever duty the

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[3] An additional "condition" which appellant argues, that the appellant and/or his parents must be advised that the Juvenile Division "had the power to relinquish jurisdiction and order him tried as an adult," we reject as meritless. No authority is cited in support of such proposition, and no reason for its adoption commends itself to us.

officer had to communicate with Bell's mother, he concededly did so before taking Bell's statement and told her that her son was being held in connection with a homicide, an armed robbery and a kidnapping. This was the sum of the officer's knowledge at that point and was fairly communicated to the mother, who nevertheless declined personal involvement in the interrogation. Any further advice by the officer as to a possible death penalty would have been the purest speculation on his part, since Bell did not actually stand in jeopardy thereof until indictment by the Grant Jury on a charge of aggravated murder with a specification of an aggravating circumstance. Moreover, we are given no reason to assume that a mother who is unmoved by the litany of heinous charges against her son, as related to her by the officer, will be moved by a recital of possible penalties, even the ultimate penalty.

We are left then with the question of whether *Miranda* v. *Arizona,* 384 U.S. 436 (1966) and its progeny dictate that the *parents* of a minor shall be given a reading of constitutional rights along with their child and whether, by extension, both are then required to intelligently and voluntarily waive those rights as a condition to the constitutional competence of inculpatory statements from the minor. We find nothing in *Miranda* which could dictate that result, although it may be conceded that when a minor is sought to be interrogated, the question of whether he knowingly and willingly waives constitutional rights cannot always be decided by the same criteria applied to mature adults. Cf. *Haley* v. *Ohio,* 332 U.S. 596 (1948); *In re Gault,* 387 U.S. 1 (1967). Thus, we have no quarrel with the language of the United States District Court in *United States ex rel B.* v. *Shelly,* 305 F. Supp. 55 (E.D.N.Y. 1969), relied upon by appellant:

> Maturity is obviously a factor in assessing understanding, whether a confession . . . or *Miranda* rights are

> involved. . . . While *In Re Gault,* 387 U.S. 1 (1967) . . . has not made a relinquishment of constitutional rights by a juvenile in the absence of parents or adult friends impossible, it teaches us to be cautious in finding a meaningful waiver by a lone child.
>
> *Id.* at 58.

Nor would we question the wisdom of Judge Weinstein's further comment in *Shelly* that:

> Where a child is involved, a period to compose himself and to obtain the assistance of a mature adviser must be granted if there is to be any assurance that he knowingly waived vital constitutional rights. . . .
> *Id.* at 59-60.

However, we can find nothing in the instant record which would violate any of these precepts. Bell was, in fact, afforded the opportunity to consult with a lawyer or with his mother, and did, in fact, have a period to compose himself while the officer consulted with his mother. There is nothing in the record of this case bearing any remote resemblance to the assault by officialdom on a "frightened and tired" child that worked the impermissible conduct in *Shelly.* Cf. *State* v. *White,* 494 S.W. 2d 687 (Mo. App. 1973). Indeed, we are impressed with the meticuous care with which the police approached the rights of Bell, and which surrounded the taking of the statement, and are unable to conclude that the statement was given in other than a willing and knowing fashion by a subject who, though a minor, was both reasonably intelligent and knowledgeable, and who thoroughly understood and voluntarily and intelligently waived his constitutional rights, including any right to the presence of a mature advisor.

To the extend that *Lewis* v. *State,* 288 N. E. 2d 138, 142 (Ind. App. 1972) seems to hold (in addition to the criteria

outlined above and found present here) that "a juvenile's statement or confession cannot be used against him at a subsequent trial or hearing unless *both he and his parents or guardian* were informed of his rights to an attorney, and to remain silent," we decline to follow such rule. We also note that in the *Lewis case,* unlike our own, the juvenile's mother was not contacted until *after* the confession was taken (although that factor would not seem to affect the broadly stated Indiana rule as quoted above). We held, therefore, that where the State has satisfied its undoubted burden of proving that an inculpatory statement by a minor was voluntarily made pursuant to an intelligent and willing waiver of constitutional rights concerning which he was fully advised, under circumstances demonstrating due regard for the fact that the tender years of the accused require an even more scrupulous attention to the foregoing issues of voluntariness and understanding than in the case of an adult, the overruling of a motion to suppress such statement and its subsequent introduction into evidence was not error simply because the police neglected or declined to charge the mother, or other mature advisor, with the accused's *Miranda* rights.

Appellant's fifth assignment of error is overruled.

IV.

Appellant's sixth assignment of error asserts that the finding of guilt was contrary to law and to the manifest weight of the evidence, and is predicated on the argued absence of evidence that Bell participated in the acutal killing of Graber, or in the planning of it. From this, appellant argues that Bell's connection with the crime of homicide was, at best, as an aider and abettor of Hall's crime, and that absent evidence that Bell advised, hired,

incited, commanded, counselled, and intended the murder, he may not be convicted therefor. We disagree.

First, we do not agree that there was no credible evidence from which the court could have concluded that Bell participated in the killing. It must be conceded that Bell was intimately involved in the kidnapping and armed robbery; his own statement confirms it. Further, the evidence of Bell's own statement shows that he drove the car into the deserted cemetery and that he asked his companion: "What was we going to do now?" T. p. 340. Further, against Bell's statement that he remained in the car while his companion Hall released the victim from the trunk, took him into the woods, shot him the first time, returned to the car for another shell, reloaded the gun and then returned to shoot the pleading Graber yet a second time, we have the evidence of the witness, Pierce, who distinctly heard *two* car doors slam before the shots, and *two* car doors open *after* the shots. Moreover, the court was not required to believe that Graber lay supinely with his hands behind his head while his assailant left him alone to return to the car to reload his gun. Evidence of bruises about the body of Graber, the comment of Bell to Hall, the physical circumstances surrounding the slaying, and the testimony of Pierce, all would have justified the trier of fact in disregarding Bell's version of the killing, and in concluding that Bell either commiteed or, actively assisted Hall in murdering the victim.

Additionally, even if Bell's version of the slaying had been accepted by the court, i.e., that he remained in the car while Hall murdered the victim of their joint kidnapping and armed robbery venture, we do not understand the law of this State to dictate Bell's acquittal of the charge of aggravated murder. One may aid and abet the commission of a crime without being physically present

when it is committed. *Browning* v. *State,* 21 Ohio L. Abs. 218 (1935); 15 O Jur 2d CRIMINAL LAW § 52. There is abundant credible evidence, already reviewed herein, to have permitted the triers of fact to conclude that Bell well knew the probable outcome of the encounter in the cemetery woods between his armed companion and the victim. Had simple robbery or ransom been the principal motive, the circumstances of the trio's presence in the cemetery would have been without purpose and the slaying utterly pointless; these facts could not have escaped Bell's attention. Yet — crediting his own story — he participated in the abduction, drove the car to the scene of the murder, sat by awaiting what he must have known would be a killing, and assisted in the escape. That evidence alone is sufficient to sustain the court's finding of guilt, for clearly, under the applicable statute, one who aids and abets another in committing an offense is guilty of the crime of complicity and may be prosecuted and punished as if he were the principal offender. R. C. 2923.03 (A) (2). It is not challenged that the charge may be stated in terms of the complicity statute, or in terms of the principal offense, as here. R. C. 2923.03 (F). We hold that the court did not err in determining Bell's guilt, either as a principal in the murder, or as an aider and abettor in the slaying; the evidence is sufficient to sustain either theory. Appellant's sixth assignment of error is overruled.

V.

The seventh assignment of error asks us to find prejudicial error in the refusal of the trial court to strike testimony of certain witnesses for the State whose intended presence (and/or criminal records) were not earlier made known to appellant pursuant to requests for discovery.

We find this assignment of error totally without merit. In most of the instances complained of, the State was either not in possession of the information in advance of trial, or had orally transmitted it to appellant's counsel as it became available during the course of the proceedings. In each instance, the trial court made careful inquiry of possible prejudice to the appellant, and concluded that none existed. We agree. The assignment of error is overruled.

VI.

Next, appellant asserts that the finding of the panel that appellant had not met his burden of proof during the "penalty trial" as to the presence of one or more mitigating factors was contrary to the manifest weight of the evidence and contrary to law. The thrust of appellant's argument here is addressed to the third mitigating circumstance contained in R. C. 2929.04 (B) (3), to wit:

> The offense was primarily the product of offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Appellant concedes that there is no suggestion of psychosis to be found in the record, but relies on the argued presence of "mental deficiency," per se. Hereunder, he is faced with the unanimous opinion of the three psychiatrists who examined him after the determination of guilt, and in connection with the penalty proceedings, that he was neither psychotic nor mentally deficient, nor that the offense was the product of either of these conditions. To the contrary, Bell was found to be "very sharp," to have an estimated I.Q. of 110-120, which would be above average, to have played chess while in jail with sufficient skill to rank as the first or second-best player there. He was,

however, found to be "easily led" and "there was strong motivation to follow along with Mr. Hall." T. p. 542.

The findings of the psychiatrists after trial varied somewhat from their earlier conclusions, when they had determined Bell to be competent to stand trial. At that time, his I.Q. was determined to be about 90, he appeared subdued and "not . . . capable of much remorse." Although found to be fully in contact with reality and not suffering from "mental defect or mental illness," he was not "able to fully appreciate the gravity of the situation that he was in — the seriousness of the overall situation." He was probably less "mature" than the average 16 year old, but fully capable of understanding the trial process and of assisting in his defense. T. p. 11-12.

This apparent lucunae, however, is filled by further examination of this record. The difference between the two findings was attributed by the psychiatrists to the improvement in living conditions brought about by being in jail over Bell's previous unconfined experience, and particularly in the absence of hallucinogens (mescaline) :

BY MR. MECHLEY:

Q. Just briefly, doctor. I think you probably already answered it, but I notice some distinctions between your first report on the 30 and your subsequent report on the 23, and I believe you said that this may have been the result of the fact that he was still under the influence of drugs on the 30, or perhaps coming out of that.

A. No. I didn't mean to imply that, but I think, being in prison for this period of time and being away from drugs and being regular in his living situation, he seemed a lot clearer, a lot more tuned-in; perhaps the focus of the second examination was a little different, too.

Q. So that it is a fact that, assuming one had been on drugs, assuming one had been drugged during that particular time, that the longer one could keep them off drugs, assuming a good diet and assuming a standard, ritual routine, assuming sometime later, 60 days, 80 days, 100 days, one would get a better report, a better idea of how they are handling themselves at that time?

A. Should, yes.

T. p. 543-44.

The sum of the evidence and testimony of the psychiatrists, psychologists, probation department, school authorities, and others thus fails to sustain appellant's position. The picture one derives is unpleaant but not unfamiliar — an unsatisfactory home, absence of familial or other supervision, involvement with drugs, inability to cope with school demands, and so on. While appellant's history is one from which the social psychologist may arguably find a degree of exculpation, it nowhere rises to the level of proof required to establish an R. C. 2929.04 (B) (3) circumstance. The offense was simply not shown to be the product of mental deficiency, and the panel did not err in so finding, or in finding that appellant did not meet his burden of proof during the penalty trial generally.

Appellant's eighth assignment of error is overruled.

VII.

Next, in his ninth and final assignment of error, raised by leave after submission of briefs and oral arguments, the appellant asserts that the trial court was without jurisdiction to hear the cause by reason of double jeopardy, namely, that Bell had previously been subjected to a hearing in the Juvenile Division on the identical offenses for which he was herein indicted, tried and convicted. Appellant's

theory rests on the cases of *Breed* v. *Jones,* 421 U.S. 519, 95 S. Ct. 1779 (1975) and *Brenson* v. *Havener,* 403 F. Supp. 221 (N.D. Ohio 1975), wherein juveniles had been adjudicated delinquents before being bound over for trial as adults on identical offenses. These cases, however, are factually inapposite to the cause before us, and the argument is not well taken.

Thus, in the instant matter, the transcript of the docket reveals that while Bell had indeed been the subject of a hearing in the juvenile division, said proceeding was the *non*-adjudicatory *probable cause* hearing prescribed by R. C. 2151.26,[4] a procedure designed to protect the juvenile, and a procedure wherein the merits are not reached. Cf. *In re Winship,* 397 U.S. 358, 367 (1970); *State* v. *Carmichael,* 35 Ohio St. 2d 118, cert. den. 414 U.S. 1161 (1974).

Accordingly, it is plain, and we so hold, that where a juvenile offender is subjected to no more than the statutory probable cause hearing under R. C. 2151.26 before his bind-over to the court of common pleas to be tried as an adult, and where, as here, there is no adjudication of delinquency in consequence of said probable cause determination, jeopardy does not attach and there is no impediment thereafter to the common pleas court's taking of jurisdiction. The assignment of error is overruled.

The judgment is affirmed.

SHANNON, P. J. and WHITESIDE, J., CONCUR.

WHITESIDE, J. OF THE TENTH APPELLATE DISTRICT SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

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[4] See Entry of November 4, 1974, *In re Willie Lee Bell,* J. C. 74-08044, Hamilton County Court of Common Pleas, Juvenile Division.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.